

**BEFORE THE HEARINGS PANEL**

**UNDER** the Resource Management Act 1991

**IN THE MATTER** of Proposed Plan Change 17 to the Waipā District Plan

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**REPLY ON BEHALF OF WAIPĀ DISTRICT COUNCIL**  
**Date 30th June 2023**

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## **MAY IT PLEASE THE HEARINGS PANEL**

### **Introduction**

1. These legal submissions in reply (**Reply Submissions**) adopt the same abbreviations defined and utilised within the Opening Legal Submissions on Behalf of Waipā District Council dated 9 June 2023 (**Opening Submissions**).

### **Provisions and matters raised in submissions**

2. The provisions which Council proposes to incorporate in its District Plan through PC17 are documented in Appendix A in each of the following reports:
  - (a) The s42A Report;
  - (b) The s42A Report Addendum; and
  - (c) The Addendum #2 (Final Recommendation) to Section 42A Hearing Report on Proposed Plan Change 17 Hautapu Industrial Zone (**s42A Report Addendum #2**).
3. At the adjournment of the PC17 hearing on 14 June 2023, all of the proposed changes outlined in Appendix A of each of the three reports provided under s42A of the RMA are before the Hearings Panel to decide. The proposed changes that raise legal issues to be addressed in these Reply Submissions are two rezoning proposals:
  - (a) Whether the Kama Trust land (Area 6) should be rezoned from Rural to live Industrial Zone; and
  - (b) Whether the HLG land to the north of Area 6 (Area 7) should be rezoned from Rural to Deferred Industrial Zone. An alternative request of 26 May 2023 to rezone the HLG land in Area 7 from Rural to live Industrial Zone was withdrawn at the hearing on 14 June 2023.

**Legal matters relevant to Hearings Panel's consideration of the rezoning proposals**

4. The Opening Submissions set out the checklist, as recorded in the Court's decision in *Colonial Vineyard*,<sup>1</sup> of the criteria relevant to the Hearings Panel's considerations of all provisions and matters raised in submissions on PC17. Applying this checklist to PC17, the legal issues arising from the matters to which the Hearings Panel must now be satisfied in order to make a decision on the two rezoning proposals are addressed below.

Accords with, and assists, Council to carry out its functions under s31 of the RMA

5. The economic evidence before the Hearings Panel<sup>2</sup> concluded that the proposed rezoning of rural land in Areas 6 and 7 to Industrial and Deferred Industrial respectively, is required to address a current (and foreseeable) lack of sufficient development capacity in business land, which includes industrial-zoned land, to meet demand in the Waipā district. No economic expert evidence was presented to the Hearings Panel rebutting this conclusion.

Gives effect to relevant national policy statements and the Operative RPS and has regard to Proposed Change 1

*Relevant national policy statements*

6. The majority of expert evidence presented at the hearing indicated that:
  - (a) Consideration of the NPS-UD supported the live industrial rezoning of the Kama Trust land in Area 6; and

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<sup>1</sup> Appendix A of Opening Submissions.

<sup>2</sup> Statement of Evidence of Tim Heath on behalf of the Hautapu Landowners' Group, 13 March 2023 at paragraph 40 and the Statement of Evidence of David Totman, 25 May 2023 at paragraph 49 (referencing the Statement of Evidence of Fraser James Colegrave, Economics, 28 February 2023 filed on Private Plan Change 20 to the District Plan).

- (b) Consideration of the three relevant national policy statements applying to the HLG land in Area 7, being the NPS-UD and the NPS-HPL, could support the deferred industrial rezoning of this land.
7. In response to questions from the Hearings Pane, expert witnesses did discuss the tension between the NPS-HPL (which only applies to HLG's land in Area 7) and the NPS-UD, with mixed views expressed as to how or whether these tensions could be reconciled.
8. The NPS-UD and the NPS-HPL are both promulgated under s45 of the RMA. Section 45(1) confirms that the purpose of each NPS is to:

... state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act [that is, the RMA].

[Our clarification added.]

9. The Courts have pointed out that the purpose of an NPS promulgated under s45 of the RMA is to record objectives and policies that may be relevant, on a case-by-case basis, to achieving the purpose of the Act. This is to be distinguished from the purpose of the New Zealand Coastal Policy Statement promulgated under s56 of the RMA which is to state objectives and policies that actually achieve the purpose of the Act:

[83] ... the New Zealand Coastal Policy Statement at issue in *King Salmon*, and the NPSET, derive from different sections of the Act, which use different terms. Section 56 makes it clear that the purpose of the New Zealand Coastal Policy Statement is to state policies in order to achieve the purpose of the Act. In contrast, the NPSET was promulgated under s 45(1). Its purpose is to state objectives and policies that are relevant to achieving the purpose of the Act. Section 56 suggests that the New Zealand Coastal Policy Statement is intended to give effect to the Part 2 provisions in relation to the coastal environment. **A national policy statement promulgated pursuant to s 45 contains provisions relevant to achieving the Resource Management Act's purpose. The provisions are not an exclusive list of relevant matters and they do not necessarily encompass the statutory purpose...**

[84] .... The NPSET is not as all embracing of the Resource Management Act's purpose set out in s 5 as is the New Zealand Coastal Policy Statement. In my judgment, **a decision-maker can properly consider the Resource Management Act's statutory purpose, and other Part 2 matters, as well as the NPSET, when exercising functions and powers under the Resource Management Act. They are not**

**however entitled to ignore the NPSET; rather they must consider it and give it such weight as they think necessary.**<sup>3</sup>

[Our emphasis added.]

10. The two rezoning proposals must ensure that the District Plan can give effect to each relevant NPS listed in paragraph 6 above.<sup>4</sup> Applying the Courts' guidance to the Hearings Panel's considerations of the rezoning proposals, while the NPS provisions are relevant to achieving sustainable management, they are not individually or collectively an exclusive list of relevant matters and they do not necessarily encompass the statutory purpose of sustainable management.
11. There was no dispute amongst the experts that the deferred industrial zoning proposed for HLG's rural land in Area 7 constitutes 'urban rezoning' for the purposes of the NPS-HPL and consequently, on that basis, the Hearings Panel is required to work HLG's rezoning request through the criteria in clause 3.6(1) of the NPS-HPL before determining if HLG's rezoning submission can be accepted:

#### 3.6 Restricting urban rezoning of highly productive land

(1) Tier 1 and 2 territorial authorities **may allow urban rezoning of highly productive land only if:**

(a) the urban rezoning is **required to provide sufficient development capacity to meet demand for housing or business land** to give effect to the National Policy Statement on Urban Development 2020; **and**

(b) there are **no other reasonably practicable and feasible options** for providing at least sufficient development capacity within the same locality and market while achieving a well-functioning urban environment; **and**

(c) the environmental, social, cultural and economic **benefits of rezoning outweigh the long-term** environmental, social, cultural and economic **costs** associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values...

[Our emphasis added.]

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<sup>3</sup> *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [83] and [84].

<sup>4</sup> Section 75(3)(a) of the RMA.

12. Planning evidence presented on behalf of Waikato Regional Council (**WRC**)<sup>5</sup> and Marie Barrie<sup>6</sup> argued that HLG had not presented sufficient evidence to confirm that the deferred industrial rezoning of their land satisfied the criteria in clause 3.6(1), and subclause 3.6.1(a) in particular, of the NPS-HPL. In response to questions from the Hearings Panel regarding the further assessment opportunity a future plan change to rezone the HLG land to a live industrial zone would represent, Ms Andrews (presenting planning evidence on behalf of WRC) advised the Panel that she was more concerned with a lack of sufficient assessment against the provisions of the RPS than the NPS-HPL. We will return to the RPS shortly.
  
13. Planning and economic expert evidence presented on behalf of HLG,<sup>7</sup> Kama Trust<sup>8</sup> and Council's s42A Report Team<sup>9</sup> concurred that the deferred industrial rezoning of the HLG land in Area 7 satisfied the three statutory criteria in clause 3.6(1) of the NPS-HPL for a number of reasons, the key reasons being:
  - (a) The majority of rural land in Cambridge is classified as highly productive land for the purposes of the NPS-HPL. This imposes a significant and real constraint on the ability to consider alternative land to provide sufficient development capacity in the area.

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<sup>5</sup> WRC did not lodge an original submission on the notified version of PC17 which proposed the rezoning of the Kama Trust land in Area 6. WRC's further submission opposed the rezoning of the HLG land in Area 7. Accordingly, the scope of WRC's submission (and its evidence) on PC17 relating to rezoning is restricted to the rezoning of the HLG land alone.

<sup>6</sup> Statement of Evidence of Katrina Rose Andrews for the Waikato Regional Council, Planning, Dated 26 May 2023 at paragraph 47 and Supplementary Statement of Evidence (Planning) of Christina Walker on Behalf of Maria Barrie, Dated 23 May 2023 at paragraph 4.8.

<sup>7</sup> Statement of Rebuttal Evidence of Mark Bulpitt Chrisp on Behalf of the Hautapu Landowners' Group, Planning, 2 June 2023 at paragraph 2.4. Statement of Evidence of Tim Heath on Behalf of the Hautapu Landowners' Group, Economics, 13 March 2023, paragraphs 50 to 54. Statement of Rebuttal Evidence of Tim Heath on Behalf of the Hautapu Landowners' Group, 2 June 2023 at paragraphs 15 and 16.

<sup>8</sup> Rebuttal Statement of Evidence of Gareth Elliott Moran on Behalf of Kama Trust, Planning, 17 March 2023 at paragraphs 21 and 22.

<sup>9</sup> s42A Report Addendum at paragraphs 4.1.12, 4.1.17 and 4.1.26.

- (b) The HLG land is currently zoned Rural and classified as LUC 1 land, and therefore meets the definition of ‘highly productive land’ for the purposes of clause 3.5(7) of the NPS-HPL. However, the facts confirm that the overwhelming majority of the HLG land has negligible ‘productive capacity’<sup>10</sup> in terms of its ability to support land-based primary production over the long-term because:
- (i) One third of the land is subject to the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011,<sup>11</sup> and
  - (ii) The remainder of the land is highly fragmented by rural residential / lifestyle use constraining its ability to sustain viable productive economic units.
- (c) Industrial growth in Cambridge is occurring at twice the rate forecast in the Future Proof Business Development Capacity Assessment 2021. This indicates there is a growing shortfall in industrial land in the Cambridge and Hautapu area in the short to medium term. Council does therefore need to consider whether the deferred industrial rezoning of the HLG land helps it to provide sufficient development capacity in the Waipā District.
- (d) There are significant efficiency opportunities in development, infrastructure integration and reverse sensitivity management in rezoning the HLG land from rural to deferred industrial now in order to complement the surrounding live industrial zoning of the Kama Trust land through PC17.

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<sup>10</sup> Clause 1.3 of the NPS-HPL.

<sup>11</sup> Regulation 7(b).

14. The expert evidence presented to the Hearings Panel, and in the particular absence of expert evidence to rebut the economic evidence presented, supports the following conclusions:
  - (a) The rezoning of the Kama Trust land in Area 6 gives effect to the NPS-UD.<sup>12</sup>
  - (b) The rezoning of the HLG land from Rural to Deferred Industrial satisfies the criteria of clause 3.6(1) of the NPS-HPL. On that basis the Hearings Panel may allow the rezoning of HLG's land to Deferred Industrial.
  - (c) The rezoning of the HLG land in Area 7 gives effect to the NPS-UD.<sup>13</sup>

*The RPS*

15. Objective 6 and Policy 8 of the NPS-UD referenced in Opening Submissions,<sup>14</sup> do provide the Hearings Panel with flexibility to consider deferred industrial rezoning for the HLG land even though that rezoning is, arguably, not expressly anticipated in the Operative RPS. These two particular NPS-UD provisions enable Council to provide for development capacity through plan changes even if such development capacity is either not anticipated in the relevant regional policy statement, regional plan or district plan, or is out-of-sequence with planned land release.
16. As noted in Opening Submissions, the Operative RPS is subject to Proposed Change 1 which, amongst other things, introduces a new Policy UFD-P11 and related Method UFD-M49 (as directed by the NPS-UD) to guide consideration of such plan changes. At this point in time while the Hearings Panel "shall have regard to" Proposed Change 1,<sup>15</sup> little

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<sup>12</sup> s42A Report at paragraphs 4.2.1 to 4.2.7.

<sup>13</sup> s42A Report Addendum at paragraphs 4.1.11 to 4.1.14.

<sup>14</sup> Opening Submissions at paragraphs 29 and 30.

<sup>15</sup> Section 74(2)(a) of the RMA



statutory weight can be applied to it due to the fact that the adjourned hearing of submissions on Proposed Change 1 is, we understand, not yet formally closed<sup>16</sup> and, consequently, no decision has yet been issued.<sup>17</sup> A review of the Proposed Change 1 provisions, and in particular those seeking to give effect to Objective 6 and Policy 8 of the NPS-UD, indicates that it is difficult to envisage WRC's decision on Proposed Change 1 *not* being subject to a subsequent appeal process.

17. Against this background, and in light of the fact that new Policy UFD-P11 and Method UFD-M49 is WRC's response to an NPS-UD directive "for the purpose of implementing Policy 8",<sup>18</sup> it is appropriate to place more weight at this point in time on the higher-order planning document, being the NPS-UD itself, and in particular Objective 6 and Policy 8, to guide the Hearings Panel on its consideration of the rezoning proposal for the HLG land. This is consistent with Council's statutory obligation to change its District Plan, through PC17 in this instance, "in accordance with... a national policy statement".<sup>19</sup>
18. The general themes that are consistent between the NPS-UD and NPS-HPL that PC17's changes to the District Plan must be in accordance with,<sup>20</sup> the two NPSs and Operative RPS that the District Plan must give effect to<sup>21</sup> and Proposed Change 1 that the Hearings Panel must have regard to<sup>22</sup> include the following:
  - (a) Provision for unanticipated or out-of-sequence development capacity is provided for.

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<sup>16</sup> A telephone enquiry was made to WRC on 27 June 2023 which has not, at the date of these Closing Submissions, been answered.

<sup>17</sup> Opening Submissions at paragraph 31.

<sup>18</sup> Clause 3.8(3) of the NPS-UD.

<sup>19</sup> Section 74(1)(ea) of the RMA.

<sup>20</sup> *Ibid.*

<sup>21</sup> 75(3)(a) and 75(3)(c) of the RMA.

<sup>22</sup> Section 74(2)(a)(i) of the RMA.

- (b) Provision for unanticipated or out-of-sequence development capacity can respond to shortfalls in business land and contribute to well-functioning urban environments.
  - (c) New industrial development does not have to be exclusively located in the RPS' strategic industrial nodes or in accordance with its indicative timing.
  - (d) Provision for new industrial development located outside the RPS' strategic industrial nodes and indicative timing may occur without undermining the roles of those strategic industrial nodes and while managing effects on infrastructure.
  - (e) Support logical expansion of established industrial areas and connection with existing and planned development and infrastructure.
  - (f) Consideration of compatibility with adjacent land uses.
  - (g) Consideration of effects on tangata whenua and their values and aspirations for urban development.
  - (h) Support Te Ture Whaimana o Te Awa o Waikato - the Vision and Strategy for the Waikato River.
19. It was acknowledged by WRC during the hearing that further assessment of the zoning of the HLG land could be addressed in the future plan change process required to rezone the HLG land from deferred industrial to a live industrial zoning. Nevertheless, and as noted in paragraph 13 of these Closing Submissions, expert evidence has been placed before the Hearings Panel to assist it in its consideration of the deferred industrial rezoning of the HLG land in terms of the Operative RPS and Proposed Change 1.

Section 32 and 32AA Evaluation

20. The original s32 Evaluation Report for PC17 was provided in the public notification bundle dated 30 September 2022. A Further Evaluation Report required under s32AA of the RMA was recorded in the s42A Report Addendum filed on 19 May 2023.
21. As stated in paragraph 18 of the Opening Submissions, the Further Evaluation Report is only required for those changes to PC17 proposed to the notified version of PC17 which was the subject of the original s32 Evaluation Report. The only significant proposed changes between the notified version of PC17 and the changes proposed to PC17 result from changes requested or matters raised by submitters, including HLG's submission to rezone its land from Rural to Deferred Industrial Zone. Section 4 of the s42A Report concludes that the HLG rezoning proposal, as a component of PC17, satisfies the requirements of s32 of the RMA.

**Summary**

22. The rezoning proposals for the Kama Trust and HLG land respectively accord with and assist Council to address a current and foreseeable lack of sufficient development capacity in business land to meet demand in the District. While expert planning evidence was presented to the Hearings Panel both confirming and negating this proposition, the only expert economic evidence before the Panel confirmed this view.
23. The rezoning of the Kama Trust land from rural to live industrial gives effect to the NPS-UD. The Hearings Panel can allow the rezoning of the HLG land from rural to deferred industrial under the NPS-HPL and, it is submitted, that rezoning will also give effect to the NPS-UD.
24. Expert evidence has been presented to the Hearings Panel to enable it to give effect to the Operative RPS and have regard to Proposed Change 1.

While the RPS regime, as a whole, is currently in a state of change due to the absence of significant weight that can currently be applied to Proposed Change 1, it is submitted that recourse to the higher planning document, the NPS-UD, assists the Hearings Panel to identify and consider the appropriate provisions and overall policy themes.

25. The s42A Report and s42A Report Addendum confirm that the two rezoning proposals satisfy the requirements of s32 of the RMA.

Signed this 30th day of June 2023

*Theresa Le Bas.* 

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